SUPREME COURT, U.S.
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No. 87-1871

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

FRANCIS MARION CAVE,
Petitioner,

v.

PITTSBURGH CORNING CORPORATION,
UNITED STATES GYPSUM COMPANY,
and NATIONAL GYPSUM COMPANY,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATE COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PARTIES TO THE PROCEEDING

The caption of the case contains the names of all parties to the proceedings in the Fourth Circuit Court of Appeals whose judgment is sought to be reviewed by this Court.

Pittsburgh Corning Corporation, a party to this appeal, is not a subsidiary or affiliate of any publicly owned corporation.

United States Gypsum Company, a party to this appeal, is not a subsidiary or affiliate of any publicly owned corporation.

National Gypsum Company, a party to this appeal, is not a subsidiary or affiliate of any publicly owned corporation.

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BRIEF IN OPPOSITION OF RESPONDENTS PITTSBURGH CORNING CORPORATION, UNITED STATES GYPSUM COMPANY, and NATIONAL GYPSUM COMPANY

The Respondents, Pittsburgh Corning Corporation, United States Gypsum Company and National Gypsum Company oppose certiorari in this case. The reasons asserted by the Petitioner are insufficient to warrant review of the Fourth Circuit's decision, since they are premised upon an incomplete comparison of the federal and state interests involved and upon the claimed importance of the cause to the Petitioner.

In *Erie Railroad Company v. Tompkins*, 304 U.S. 64 (1938), *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525 (1958) and *Hanna v. Plumer*, 380 U.S. 460 (1965), this Court has established guidelines to be followed in deciding whether federal or state law will control in certain conflicts situations. While the word tests of these cases artfully suggest resolution

points under language such as "bound up", "outcome determinative", and "procedural versus substantive", the underlying truth in each case is that while federal and state systems of justice are independent, they at times meet on overlapping grounds. In these confrontations, Rules of conflicts of laws determinations have evolved which must not be taken as text oriented but must be grounded in the underlying policies of the *Erie* rule.

The Fourth Circuit considered the underlying policies established by *Erie*, *Byrd* and *Plumer* involved in this case in deciding *Auer v. Kawasaki Motors Corp. U.S.A.* and *Ebaugh v. Cessna Aircraft Co.*, 830 F.2d 535 (4th Cir. 1987), *cert. denied, sub nom. Ebaugh v. Cessna Aircraft Co.*, 108 S.Ct. 1076 (1988). There, the Fourth Circuit noted that, when in a diversity only case, the question of the effect of a release upon the rights and duties of third parties is in issue, state law and not federal common law must be followed, since rights and duties of third parties to the actionable events derived from the same state law.

The Commonwealth of Virginia has spoken precisely on the issue of *Cave* in *Potomac Hosp. Corp. v. Dillon*, 229 Va. 355, 329 S.E.2d 41, *cert. denied*, 106 S.Ct. 352 (1985) and in *Shiflet v. Eller*, 228 Va. 115, 319 S.E.2d 750 (1984). Both cases establish that covenants not to sue under Virginia Code Section 8.01-35.1 (Cum. Supp. 1987) cannot be utilized with causes of action accruing before the effective date of the statute. Virginia observed that retroactive application would nullify a co-defendant's vested substantive right to contribution without due process of law.[1]

In *Cave*, the Fourth Circuit followed the underlying Rules of *Erie*, *Byrd* and *Plumer*, in determining the management of a district court's docket and resolution of its cases, as urged by Cave, did not outweigh the loss of the substantive right of contribution, the obvious difference in treatment of defendants depending upon the forum in which they might be placed, and the potential for different outcomes for the same issue in state

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[1] Under Virginia law, a cause of action in a case like Cave's accrues when the plaintiff had a diagnosable and recognizable disease and not with each tortious event. *See Locke v. Johns-Manville Corp.*, 221 Va. 951, 275 S.E.2d 900 (1981).

and federal courts.[2]

Of similar importance is the rule consistently followed by this court that:

> [C]ertiorari should be sparingly exercised, and only when the circumstances of the case satisfy the court that the importance of the question involved, the necessity of avoiding conflict between two or more courts of appeal, or between courts of appeal and the courts of a state, or some matter affecting the interests of the nation in its internal and external relations, demands such exercise.

Fields v. United States, 205 U.S. 292, 295 (1907).

The Fourth Circuit's decision does not conflict with any other federal circuit on the issues raised by *Cave*. In fact, the sixth and third circuits apparently agree with the Fourth Circuit's conclusion in *Cave*. *See Carolina Casualty Ins. Co. v. Insurance Co. of North America*, 595 F.2d 128, 139-40 (3rd Cir. 1979); *Hageman v. Signal L. P. Gas, Inc.*, 486 F.2d 479 (6th Cir. 1973); *see also Lee v. Hunt*, 631 F.2d 1171 (5th Cir. 1980), *cert. denied, sub nom. Hunt v. Hunt*, 454 U.S. 834 (1981), *reh. denied*, 454 U.S. 1129 (1981). Of additional interest, is the observation that this court previously declined to review the identical issue in *Auer*. *See id.*, 830 F.2d 535, *cert. denied, sub nom. Ebaugh v. Cessna Aircraft Co.*, 108 S.Ct. 1076 (1988).

In short, the message of this Court stated in *Magnum Import Co. v. Coty*, 205 U.S. 159, 163 (1923) should control:

> The jurisdition to bring up cases by certiorari from Circuit Courts of Appeals...was not conferred upon this court merely to give the defeated party in the circuit court of appeals another hearing.

Cave has requested that this Court hold this petition pending the rulings in *Stewart Organization, Inc. v. Ricoh Corp.*, No. 86-1908 (U.S. 1986) and *Budinich v. Becton Dickinson and Co.*, No. 87-283 (U.S. 1987). *Stewart* was argued on February 29, 1988 and this Court has not yet rendered its opinion. *Budinich*

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[2]Only those cases with a cause of action arising before July 1, 1979 are similarly effected, not the hundreds of cases originally filed, since the majority of the older cases are now off the docket.

was decided on May 23, 1988 by this Court. In *Budinich* this Court ruled federal law applies where the resolution of issues is governed by federal statute. The ruling of *Budinich* has no effect on *Cave*, since the *Cave* issue is not governed by federal statute. In any event *Cave* continues to be not of sufficient constitutional importance for this Court to withhold its decision on the Petition now pending.

CONCLUSION

The Petition for Writ of Certiorari should be denied. There is no new or fresh issue of Constitutional moment to be decided in view of *Erie*, *Plumer* and *Byrd*, nor is there conflict among the federal circuits. In essence, the issues are for state determination, and they have been long decided. The Fourth Circuit correctly applied the law as it is and ought to be in determining that Virginia law must be applied to the issues of this case.

Respectfully submitted,

PITTSBURGH CORNING CORPORATION,
UNITED STATES GYPSUM COMPANY and
NATIONAL GYPSUM COMPANY

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